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CASE NO. 86-344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF OHIO,
MARK HOLDERMAN, AND KENNETH COX,

Appellants.

v.

FLEET AEROSPACE CORPORATION,

Appellee.

On Appeal From
The United States Court Of Appeals For
The Sixth Circuit

MOTION OF APPELLEE FLEET AEROSPACE CORPORATION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this appeal presents a justiciable controversy when:

(a) The private dispute that gave rise to this litigation has been resolved.

(b) The State of Ohio has suffered no injury as a result of appellee's alleged violation of the Ohio Contro! Share Acquisition Act (the ''Act'') which can be redressed by a reversal of the decision below.

(c) The appeal is from a non-final order which has no *res judicata* or collateral estoppel effect on the State of Ohio.

2. Whether the unanimous decision of the Court of Appeals for the Sixth Circuit enjoining appellants the State of Ohio and its officers Mark Holderman and Kenneth Cox (collectively the ''State of Ohio'' or the ''State'') from enforcing the Ohio Control Share Acquisition Act in connection with the tender offer of appellee Fleet Aerospace Corporation (''Fleet'') for shares of Aeronca, Inc. (''Aeronca'') should be summarily affirmed when:

(a) The Act directly regulates commercial transactions between nonresidents of Ohio and imposes burdens on interstate commerce which are substantial and which cannot be justified by any putative local benefits conferred by the Act.

(b) The Act permits the management of Ohio corporations to delay the consummation of a tender offer far beyond the timetable established by the federal Williams Act, disturbing the balance between tender offeror and target management created by Congress; it deprives individual non-Ohio resident shareholders of the opportunity to decide for themselves whether to tender their shares; and the State of Ohio maintains that it has authority to rescind a completed tender offer conducted in violation of the Act.

PARTIES TO PROCEEDINGS BELOW

In the United States Court of Appeals for the Sixth Circuit the parties were: Fleet Aerospace Corporation as plaintiff-appellee; Aeronca, Inc. as defendant-appellant; Mark Holderman and Kenneth Cox as defendants-appellants; and the State of Ohio as intervenor-appellant. Aeronca is not a party to the instant appeal.

Appellee Fleet Aerospace Corporation has the following eighty-one percent non-wholly owned subsidiary: Fathom Oceanology Limited.

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MOTION OF APPELLEE FLEET AEROSPACE CORPORATION TO DISMISS OR AFFIRM

PRELIMINARY STATEMENT

By this appeal the State of Ohio and two of its officers, Mark Holderman, Acting Ohio Commissioner of Securities, and Kenneth Cox, Director of the Ohio Department of Commerce (collectively, the "State of Ohio" or the "State"), in effect ask this Court to reverse its decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) ("*MITE*"), and to allow the State of Ohio to regulate interstate tender offers in a manner that both interferes with the effectuation of the Congressional purpose and intent underlying the federal Williams Act and imposes substantial and unjustifiable burdens on interstate commerce.

The State seeks this result, moreover, in the absence of a justiciable controversy. The circumstances which gave rise to the litigation in the first place—Fleet's unsolicited tender offer for Aeronca shares—were resolved through agreement between Fleet and Aeronca. Fleet completed its tender offer. Approximately eighty-nine percent of Aeronca's common shares were tendered. A subsidiary of Fleet has been merged with and into Aeronca, and Aeronca is a wholly-owned subsidiary of Fleet. The State alone pursues this appeal, even though these transactions are completed and it has suffered no injury from Fleet's conduct which can be redressed by a reversal of the decision below. There is no remedy available to the State under the Act. In effect, the State asks this Court to render an advisory opinion. *Compare Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *prob. juris. noted*, 55 U.S.L.W. 3231 (Oct. 6, 1986).

Because the appeal presents no justiciable controversy, Fleet respectfully moves to dismiss the State's appeal. Fleet moves, alternatively, to summarily affirm the decision below. The decision of the Court of Appeals was plainly correct in light of *MITE*, and this appeal presents to the Court no substantial federal question warranting review.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article I, Section 8, Clause 3 (the "Commerce Clause"):

> The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . .

United States Constitution, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution . . . .

United States Constitution, Article VI, Clause 2 (the "Supremacy Clause"):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTES AND REGULATIONS INVOLVED

The Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1981) (the "Williams Act").[1]

The Ohio Control Share Acquisition Act, Ohio Rev. Code §§ 1701.831 and 1701.832 (1985) (the "Control Share Acquisition Act" or the "Act").[2]

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1 The Williams Act is set forth in the Appendix to the State's Jurisdictional Statement ("State's App.") at A-61-69.

2 The Control Share Acquisition Act is set forth in the State's App. at A-70-76.

STATEMENT OF THE CASE

I. THE OHIO CONTROL SHARE ACQUISITION ACT

The Ohio Control Share Acquisition Act is a "second-generation" anti-takeover statute enacted by the Ohio legislature in 1982 in response to this Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). In an unusual codified statement of legislative purpose, the Ohio legislature acknowledged that it was attempting to avoid an "undue burden on interstate commerce, as expressed in recent court decisions," and admitted that "[i]nitial-state efforts to deal with tender offer developments have been questioned by the federal courts." O.R.C. § 1701.832.

The Act, however, imposes on persons seeking to make interstate tender offers burdens that are just as offensive to federal law as the Illinois statute under review in *MITE*. The Act provides, in essence, that any "control share acquisition" of an "issuing public corporation" *shall be made only with the prior authorization of its shareholders* in accordance with the Act. O.R.C. § 1701.831(A)[3] The statute purports to apply whether or not any of the shareholders to whom it is directed reside in Ohio. Thus, its requirements apply to a nationwide

3 A "control share acquisition" is defined as any acquisition, whether by tender offer, open market purchase, privately negotiated transaction or otherwise (with limited exceptions not relevant to this appeal), of shares of an issuing public corporation which, when added to all other shares of such corporation owned or controlled by the would-be acquiror, would entitle the acquiror, alone or with others, to exercise or control the exercise of one-fifth or more of the voting power of such corporation in the election of directors. O.R.C. § 1701.01(Z)(1).

An "issuing public corporation" is defined as an Ohio corporation with 50 or more shareholders that has its principal place of business, principal executive offices or substantial assets within Ohio, and as to which no close corporation agreement exists. O.R.C. § 1701.01(Y).

The Act automatically applies to all such corporations—including those in existence before its November 18, 1982 effective date—unless the corporation's articles of incorporation or regulations (*i.e.*, by-laws) provide otherwise. O.R.C. § 1701.831(A).

tender offer for shares of an Ohio corporation, even where all of the shareholders are nonresidents of Ohio.

The Act requires that a person proposing to make a "control share acquisition" notify the issuing public corporation by delivery of an "acquiring person statement" ("APS") which contains no significant information not required by the Williams Act, and that the corporation call and hold a special meeting of shareholders to vote on the proposed "control share acquisition." Management can delay the meeting for as long as fifty days after receipt of the APS. O.R.C. §§ 1701.831(B), (C). Thus, management may prevent the offeror from completing its tender offer within twenty business days after commencement of the offer, the time frame established by the Williams Act and the regulations promulgated thereunder.[4]

The proposed "control share acquisition" may not be made unless it is approved by the affirmative vote of both (a) a majority of the voting power represented at the meeting and (b) a majority of the portion of such voting power excluding any "interested shares" (those held by the acquiring person and certain officers and directors of the corporation). A quorum at such special meeting requires the presence of both a majority of the voting power of the corporation and a majority of the portion of such voting power excluding any interested shares. O.R.C. § 1701.831(E).

The Act's collective shareholder approval requirement means that individual shareholders (including nonresidents of Ohio) are deprived of the opportunity to decide for themselves whether to sell their shares at the price offered. Indeed, in

4 The APS does not provide the target company or its shareholders with any information that would not otherwise be included in the Schedule 14D-1 Statement that must be filed by a tender offeror with the SEC and delivered to the target company in connection with a tender offer under the Williams Act, or in the Schedule 14D-9 Statement that a target company's management is required to file and disseminate to shareholders pursuant to SEC Rule 14d-9 in response to a tender offer. Thus, the APS does not serve any valid local purpose.

some circumstances, it allows a minority acting as a group to veto what Congress intended to be an individual shareholder decision whether to accept or reject a tender offer. For example, if an offeror held 19% of the target's stock and company officers held an additional 11%, the tender offer would have to be approved by the holders of a majority of the remaining 70% "disinterested" shares. If only 36% of the shareholders voted against the tender offer (or did not vote at all), the offer would be blocked.[5]

Finally, even though it cites no statutory or case law authority, the State asserts that, in the event the Act is upheld, it has the right to rescind Fleet's tender offer for, and merger with, Aeronca. Thus, according to the State's own interpretation of its statute,[6] it has the ability to interfere with a nationwide tender offer—the very infirmity that this Court in *MITE* found abhorrent to both the Commerce Clause and the Supremacy Clause.

II. THE FLEET TENDER OFFER

On May 21, 1986, Fleet, a corporation incorporated and organized under the laws of Ontario, Canada, commenced an offer to purchase all Aeronca common shares for $5 cash per share (the "Offer"). Aeronca was (and remains) an Ohio cor-

5 Further, in contrast to Congress' recognition that delay hinders the offeror and gives an advantage to management, *see* S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967), by allowing the target to delay the offeror's purchase of shares pending a shareholder vote, the Act gives management an extended opportunity to delay and thereby defeat the tender offer and thus allows it an unfair advantage in its contest to maintain control of the corporation. The requisite special meeting need not be held until 50 days after receipt of the offeror's APS. The tabulation of votes and challenges and counter-challenges to proxies could result in delays lasting many weeks thereafter, before the results of the special meeting are finally, and perhaps judicially, determined. (District Court's Memorandum and Order set forth in State's App. at A-10-58, at A-28.)

6 Fleet asserts that the State may *not* rescind this transaction and thus this appeal does not present a justiciable controversy. *See infra* pp. 10-20.

poration with its principal executive offices in Charlotte, North Carolina.[7] As of April 30, 1986 there were approximately 3 million shares of Aeronca common stock outstanding, held by approximately 2,700 shareholders of record. Approximately 84% of those shareholders resided *outside* of Ohio. (State's App. at A-14.)[8]

III. THE DISTRICT COURT DECISION

Fleet commenced this action on May 21, 1986, simultaneously with the commencement of the Offer.[9] Defendants Holderman and Cox were named with Aeronca as defendants because they have statutory authority, under the Ohio Take-Over Act, O.R.C. §§ 1707.041, 1707.23 and 1707.26, to enforce O.R.C., §§ 1707.041 and 1707.042 and not because they had authority to enforce the Act—which they do not. On that same day, the District Court entered a temporary restraining order prohibiting the defendants from taking any action to invoke, enforce or apply the relevant Ohio anti-takeover statutes in connection with Fleet's Offer.

The State of Ohio moved to intervene, and on June 11, 1986 the District Court granted it leave to intervene as a permissive

7 Aeronca maintains an aerospace manufacturing plant in Middletown, Ohio. Its common stock was registered pursuant to Section 12(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1981) (the "Exchange Act"), and was traded on the American and Pacific Stock Exchanges.

8 The Fleet Offer was made in accordance with federal law but without compliance with the Control Share Acquisition Act and was conditioned upon, among other things, Fleet's obtaining judicial relief from enforcement of the Act. Pursuant to the terms of the Offer, Fleet had the right, under federal law, to purchase tendered shares commencing at 12:01 A.M. on June 12, 1986.

9 Fleet also sought relief from the application of O.R.C. § 1707.041 (Ohio's take-over bids statute) and O.R.C. § 1707.042 (Ohio's control bids anti-fraud statute). The claims relating to § 1707.041 were dismissed as moot. The District Court found no basis in the record for a suggestion that Fleet violated § 1707.042. (State's App. at A-17.) Neither application is a subject of this appeal.

intervenor. The State filed an answer and counterclaim seeking enforcement of the Act in connection with the Offer and rescission of acts or transactions effected in violation of the Act.

On June 2 and 3, 1986, the District Court conducted a hearing on Fleet's claim with respect to O.R.C. § 1701.831. On June 11, 1986 the District Court issued a Memorandum and Order holding the Control Share Acquisition Act unconstitutional and granting Fleet's motion for a preliminary injunction enjoining defendants from enforcing the Act in connection with the Offer. (State's App. at A-42.)

The District Court held that the Act violates both the Supremacy Clause and the Commerce Clause of the United States Constitution. The District Court found that the Act violates the Supremacy Clause by frustrating the objectives of the Williams Act. (State's App. at A-22-30.) The District Court also found that the Act violates the Commerce Clause both as a direct regulation of interstate commerce and, under the standard enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), as an indirect regulation. (State's App. at A-35-41.)

Thus, in line with other recent decisions which have invalidated control share acquisition statutes, *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *prob. juris. noted*, 55 U.S.L.W. 3231 (Oct. 6, 1986); *Terry v. Yamashita*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. 1986); *APL Ltd. Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn.), *vacated per agreement of parties*, Nos. 85-5285, 5286 (8th Cir. Nov. 26, 1985);[10] *Icahn v. Blunt*, 612 1400 (W.D. Mo. 1985); and the decision of this Court in

10 At the time of the *APL* decision the Minnesota statute authorized management to call the special shareholders meeting 55 days after receipt of the APS. In an apparent attempt to avoid the unconstitutional delays of such a timing requirement, Minnesota recently amended its statute so that the special meeting must be held within 20 business days of receipt by incumbent management of the APS. Minn. Stat. § 302A.671(3), *amended by* ch. 431, H.F. No. 2263, 3 Minn. Leg. Serv. 129 (1986). Under the Ohio Act the special meeting need not be held until 50 days after receipt of the APS.

MITE, the District Court preliminarily enjoined the defendants from taking any action to enforce the Control Share Acquisition Act against Fleet.

IV. THE APPEAL AND THE MERGER

On June 13, Fleet and Aeronca entered into a merger agreement, pursuant to which Fleet agreed to increase the price per share of its Offer to $6 per share. Fleet completed its tender offer at this revised price. Approximately eighty-nine percent of Aeronca's common shares were tendered. On September 17, 1986 a subsidiary of Fleet was merged with and into Aeronca, which exists today as an Ohio corporation, wholly owned by Fleet.

Despite the termination of the controversy between Fleet and Aeronca, the State pursued its appeal. On June 25 the United States Court of Appeals for the Sixth Circuit affirmed the District Court judgment. Adopting the reasoning of the opinion of the District Court, the Circuit Court held that the Act had a substantial impact on interstate commerce and imposed unconstitutional direct and indirect burdens on interstate commerce. The Sixth Circuit also held that the Act violated the Supremacy Clause because it frustrated the objectives of the Williams Act by creating delays and tipping the scales in favor of management.

The Court of Appeals stayed the issuance of its mandate until June 30, 1986 to permit the State to seek a stay from this Court. The State's application for a stay—which did not include a request that Fleet be enjoined from purchasing shares under its Offer pending appeal—was denied by Justice O'Connor on June 30, 1986 and by Justice Powell on July 3, 1986.

ARGUMENT

I. THERE IS NO JUSTICIABLE CONTROVERSY TO BE DECIDED

Under the terms of the June 13 merger agreement, Fleet agreed to increase its offering price from $5 to $6 per share and Fleet and Aeronca agreed to suspend the litigation between them. Accordingly, Aeronca dropped its objection to Fleet's consummation of its tender offer without complying with the Act, the tender offer was completed, and a subsidiary of Fleet was merged with and into Aeronca. The State alone prosecutes this appeal. The State, however, presents no justiciable controversy to this Court, and its appeal should therefore be dismissed. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984); *Tileston v. Ullman*, 318 U.S. 44 (1943).

A. The State Lacks Standing To Pursue This Appeal

At a minimum, the standing requirements of Article III require that the party who invokes the court's authority demonstrate (i) that it personally has suffered some actual or threatened injury as a result of the opposing party's putatively illegal conduct, and (ii) that the injury "is likely to be redressed by a favorable decision" and "fairly can be traced to the challenged action." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Mere interest in the establishment of a legal precedent is not sufficient to establish Article III standing. *Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944). *See also Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1331 (1986) (in constitutional cases this Court has "strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversary presentation"); *Valley Forge*, 454 U.S. at 472.

The standing requirement of Article III is fatal to the State's pursuit of this appeal. The State can show neither that it has suffered any actual or threatened injury as a result of Fleet's putatively illegal conduct nor that such injury is likely to be redressed by a favorable decision of this Court. Under either prong of the standing test its appeal must be dismissed.[11]

Citing this Court's decisions in *Diamond v. Charles*, 106 S. Ct. 1697 (1986), *Maine v. Taylor*, 106 S. Ct. 2440 (1986), and *Alfred L. Snapp & Sons*, the State contends, albeit implicitly, that it has standing as a sovereign to pursue this appeal. The fact of sovereignty alone is insufficient, however, to confer standing. Rather it is the prospect of a binding final judgment of validity or invalidity, with its attendant *res judicata* effect, that creates the risk of injury to a state and forms the basis for a sovereign's standing to defend the validity of its statute. *See Maine v. Taylor*, 106 S. Ct. at 2447 (the state's "stake in the outcome of this litigation is substantial: if the judgment of the Court of Appeals is left undisturbed, the State will be bound by the conclusive adjudication that its import ban is unconstitutional"). *Cf. Diamond*, 106 S. Ct. at 1707; *Alfred L. Snapp & Sons*, 458 U.S. at 601. The decision below, unlike those in *Diamond* and *Maine*, is not a final adjudication of the Act's constitutionality, but merely an order preliminarily enjoining the State from enforcing its statute against Fleet. The order does not prevent the State, to the extent it has any

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11 Although the State does not clearly articulate the basis on which it claims to have standing, it recites, in its jurisdictional statement, statements by this Court that a state has standing to defend the constitutionality of its statutes, and that a state has a "quasi-sovereign interest in the health and well-being . . . . of its residents." (State's Brief at 7 (quoting *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).) It further asserts that it has statutory power under O.R.C. 1707.99 and 2733.02 to seek remedies for violations of the Act. (State's Brief at 7.) None of these interests and powers, however, gives the State standing to pursue this appeal.

authority to do so, from enforcing the Act in the future or litigating its validity.[12]

Nor can the State maintain that it is injured in its quasi-sovereign capacity, since it cannot maintain a *parens patriae* action. As this Court has stated: "[i]n order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party." *Alfred L. Snapp & Sons*, 458 U.S. at 607; *see Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976). Yet the interests the State advances by pursuing this appeal are merely those of "particular private parties"—Aeronca shareholders—most of whom are not even Ohio residents and all of whom have taken care of their interests through their acceptance or rejection of the Fleet tender offer. The State cannot fairly claim that it is prosecuting this appeal on behalf of Ohio citizens or shareholders of Ohio corporations generally, since the Act is not limited in its application to Ohio citizens. Since the State is only acting to represent the interests of particular private citizens, it is not acting in its quasi-sovereign capacity and a *parens patriae* action is not appropriate.[13] *See Ruotolo v. Ruotolo*, 572 F.2d 336, 338 (1st Cir. 1978) ("The government argues that it has a strong interest in obtaining a ruling on this question. This may be so, but the desirability of an advisory opinion is not a substitute for justiciability.").

The State also fails to satisfy the second prong of the standing test: this Court will not be able to fashion a remedy to redress any purported harm that the State suffers as a result of Fleet's now completed tender offer. The Act itself affords the

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12 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4445 (1981); 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice ¶ 0.409 (2d ed. 1984).

13 In *Alfred L. Snapp & Sons* the Commonwealth of Puerto Rico was granted *parens patriae* standing to pursue the interests of its approximately 3 million residents. 458 U.S. at 609. Here the State is seeking to represent the approximately 2,700 shareholders of record of Aeronca, most of whom are Ohio nonresidents.

State no enforcement power or remedy. In its jurisdictional statement, the State refers to O.R.C. §§ 1707.99 and 2733.02, apparently to suggest the availability of a remedy, and points out that it has counterclaimed for rescission. (State's Brief at 7.) Neither statutory provision, nor the request for rescission, however, empowers this Court to provide any remedy to the State.

The State refers to O.R.C. § 1707.99, a provision in Ohio's securities law which imposes criminal penalties upon any party who commits an act described in either § 1707.042(A) or § 1707.44 of the Code, also provisions in the securities law. Neither of these provisions incorporates, expressly or by implication, § 1701.831, which is contained in Ohio's General Corporation Law. Nor does § 1701.99 (the penal provisions of the Ohio General Corporation Law) impose criminal penalties on a party who violates § 1701.831. In the absence of an express provision of such penalties, none may be imposed. O.R.C. § 2901.03(A) ("No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code."); O.R.C. § 2901.04(A) ("Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.").[14]

The State also cites O.R.C. § 2733.02—pertaining to actions in *quo warranto*—as a source of remedial authority. Like § 1707.99, however, § 2733.02 provides no remedy here. The remedy in *quo warranto* is either the ouster of the corporation from the wrongful exercise of its power or the forfeiture of the corporation's charter. O.R.C. § 2733.20. Where the corporation is a foreign corporation, like Fleet, the remedy would be

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14 In any event, Fleet is not subject to liability pursuant to either § 1707.042(A) or § 1707.44. As the District Court found, there is no basis in the record for a suggestion that Fleet violated § 1707.042(A), which relates to fraudulent practices in connection with control bids. (State's App. at A-17.) Section 1707.44, which is primarily concerned with regulating brokers and dealers in the sale of securities, is simply irrelevant to this controversy.

to oust it from the state or to prohibit it from persisting in the wrongful exercise. 45 Ohio Jur. 2d *Quo Warranto* § 57 (1960). Because the foregoing remedies are not available in this case, the State has no remedy under *quo warranto*. The State cannot stop the offending action from going forward because the tender offer and merger have been completed. It cannot oust Fleet for doing an illegal act, because Fleet is not exercising nor has it exercised any privilege, franchise or right in contravention of Ohio law in Ohio. Fleet merely purchased shares in interstate commerce and there is no remedy to be had against it in *quo warranto*.[15]

Finally, the State's claim to a rescission remedy does not confer on it standing to pursue this appeal. The State has no statutory authority to seek rescission of transactions carried out without compliance with the provisions of § 1701.831. Absent such statutory authority, the State of Ohio may not seek rescission.[16]

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15 Nor has Aeronca done anything contrary to law. Aeronca's only obligation under § 1701.831 was to call a shareholders' meeting within 10 days after it received the APS. It never received an APS from Fleet and thus its purported duty to call a shareholders' meeting was never triggered.

Moreover, a *quo warranto* proceeding only properly lies where the public interest will be served. *See, State ex rel. Brown v. Regional Public Safety Serv. Corp.*, 47 Ohio App. 2d 300, 353 N.E.2d 851 (1975); *Layle v. Schnipke*, 384 Mich. 638, 186 N.W.2d 559 (1971). Since the State would only be vindicating the rights of Aeronca shareholders who have already protected their own interests through their acceptance or rejection of the Fleet tender offer, the State may not properly maintain a *quo warranto* action.

16 In Justice Marshall's dissent in *MITE*, he opined that if MITE's proposed acquisition had been completed and the statute under review had later been found constitutional, the State would have been authorized to seek rescission to dismantle the transaction. 457 U.S. at 661 n.10. However, the State of Illinois, unlike the State of Ohio, had a statutory right to maintain a rescission action. Ill. Ann. Stat. ch. 121.5, para. 137.62 (Smith-Hurd Supp. 1979) (repealed 1983). A similar distinction is applicable to *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U. S. 173 (1979).

In *State v. Buckeye Finance Corp.*, 54 Ohio St. 2d 407, 377 N.E.2d 502 (1978), the Ohio Supreme Court held that the Director of Commerce did not have authority to sue for rescission on behalf of purchasers of securities under O.R.C. § 1707.26,[17] which conferred enforcement powers on the Director of Commerce in connection with the securities law. The Ohio Supreme Court held that if the General Assembly had intended to give the Director of Commerce the power to seek rescission, "it would have said so in language as explicit as that used in R.C. §§ 1707.41, 1707.42, and 1707.43" (remedies of purchasers). 54 Ohio St. 2d at 410, 377 N.E.2d at 504. Absent explicit provision of a rescission remedy, the Court refused to find one. In contrast to the provision under consideration in *Buckeye Finance*, which expressly gave the Director of Commerce certain enforcement powers, including the right to seek injunctions, under § 1701.831 the State is given no enforcement powers whatsoever. It follows, *a fortiori*, that the State of Ohio has no authority to seek rescission of transactions made without compliance with § 1701.831 and its request for such relief does not state a claim.[18]

17 That statute provided:

> Whenever it appears to the division of securities, upon complaint or otherwise, that any person has engaged in, is engaging in, or is about to engage in, any deceptive or fraudulent act, practice, or transaction, or in any act, practice, or transaction declared to be illegal prohibited, or defined as fraudulent in sections 1707.01 to 1707.45, inclusive, of the Revised Code, the director of commerce may apply to a court of common pleas of any county in this state for, and upon proof of any such offenses such court may grant an injunction restraining such person and its agents, employees, partners, officers, directors, and shareholders from continuing, engaging in, or doing any acts in furtherance of, such acts, practices, or transactions, and may order such other relief as the facts warrant.

O.R.C. § 1707.26 (1978) (amended 1982).

18 It is significant that the Act, which was enacted as part of Ohio's General Corporation Law, contains no enforcement provision. The failure of the Ohio legislature to confer on the State powers

Finally, because the State has no right to seek relief under O.R.C. §§ 1707.99 and 2733.02 and has no right to seek to obtain rescission, it cannot contend that the existence of the preliminary injunction against it confers standing. Because the preliminary injunction creates no bar to the pursuit of any remedy that is available to the State, even in this case, the injunction is, in effect, without substance, imposing no actual constraint on the State and conferring no standing.

B. The Appeal Is Moot

Even if the State could demonstrate that it has standing to pursue this appeal, the appeal should be dismissed because there no longer exists a live controversy between the parties to the appeal. To satisfy the "case or controversy" requirement of Article III, an actual controversy must exist at all stages of the appellate process, and not merely when the action is commenced. *See Paulussen v. Herion*, 106 S. Ct. 1339 (1986); *Hall v. Beals*, 396 U.S. 45 (1969). Here, there is no longer a

Footnotes 18 continues:

to enforce the Act appears, moreover, to have been deliberate, not inadvertent. The Ohio securities law (including its take-over act), unlike the Control Share Ac quisition Act, contains detailed provisions prescribing penalties for violations and conferring broad enforcement powers on the State. The Control Share Acquisition Act was presented to and passed by the Ohio legislature as part of a bill that also contained provisions amending Ohio's securities law, including penal provisions and provisions relating to the State's enforcement powers. O.R.C. §§ 1707.23, 1707.26 and 1707.99. Thus, it is clear that at the very time the Ohio legislature was considering the Act it was considering penal and State enforcement provisions in connection with related legislation, that when it intended to confer enforcement powers on the State it specifically delineated them and that it was no accident that it provided none whatsoever in connection with the Control Share Acquisition Act. The reason for the omission was, no doubt, the legislature's concern as voiced in the Act to avoid the infirmities of the Illinois statute invalidated in *MITE*.

In ruling that this appeal presented a justiciable controversy, the Sixth Circuit stated, "[W]e find that since the State of Ohio has indicated that it intends to enforce the Act against Fleet unless precluded by an injunction from doing so, the issues before us are not moot." *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135, 138-39 (6th Cir. 1986). Since the State in fact has no authority to enforce the Act, the Sixth Circuit was incorrect.

live controversy, because this Court can fashion no relief that will affect the rights of the parties and there is no basis for continued litigation. *See MITE*, 457 U.S. at 655 (Marshall, J., dissenting); *DeFunis v. Odegaard*, 416 U.S. 312, 316-17 (1974).[19] Accordingly, the appeal is moot.

In *MITE*, four members of this Court found that the case was moot. Justice Marshall, joined by Justices Brennan and Powell, contended that the fact that MITE's allegedly unlawful conduct had been taken under the protection of a preliminary injunction rendered it immune from prosecution by the State for that conduct. He reasoned:

> [E]ven if the Court had held that the Illinois Act is constitutional, and had lifted the permanent injunction . . . there would be no basis for continued litigation. The Secretary stated that if the decision below were reversed, he would initiate enforcement proceedings against MITE . . . . But [the] preliminary injunction . . . would have barred the Secretary from seeking either civil or criminal penalties for violations of the Act that occurred during that period. MITE would have a complete defense to such an action.

457 U.S. at 655-56.

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19 The State cannot avail itself of the "capable of repetition, yet evading review" exception to the mootness doctrine. *MITE*, 457 U.S. at 662. *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Here, as in *MITE*, there is no demonstrated probability that Ohio will have occasion to prevent Fleet from making a takeover offer for some other corporation. Moreover, the "capable of repetition, yet evading review" doctrine is traditionally utilized only in exceptional situations where by the very nature of the injury appellate review will be denied if the normal justiciability requirements are not relaxed. *See Roe v. Wade*, 410 U.S. 113, 125 (1973). The fact that this Court is presented with a live controversy in *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *prob. juris. noted*, 55 U.S.L.W. 3231 (Oct. 6, 1986), belies any such contention by the State here.

Fleet respectfully urges that this Court adopt the reasoning of Justices Marshall, Brennan and Powell and hold that because Fleet's purchases were made under the protection of a preliminary injunction, Fleet is immune from prosecution for those purchases, mooting this appeal.

This appeal is moot for yet a further reason. Fleet completed its tender offer for shares of Aeronca common stock, and a subsidiary of Fleet has been merged with and into Aeronca. As noted above, the State has no available remedy for any violation of the Act. Approximately 21 million dollars have been disbursed in interstate commerce, not simply to thousands of Aeronca record holders, but to many more beneficial owners, whose identities are not known to Fleet. It would be virtually impossible to trace these beneficial owners and to reverse the thousands of individual transactions flowing from the completion of Fleet's tender offer. Courts have repeatedly recognized that it is impossible to rescind a tender offer once the acquiror has successfully purchased its shares. *See, e.g., Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 846, 851 (3d Cir. 1973), *cert. denied*, 419 U.S. 870 (1974); *Sonesta Int'l Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247, 250 (2d Cir. 1973); *Gulf & W. Indus., Inc. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, 698 (2d Cir. 1973); *Pabst Brewing Co. v. Kalmanovitz*, 551 F. Supp. 882, 895 (D. Del. 1982).

Chief Justice Rehnquist also dissented from the opinion of the Court in *MITE* on mootness grounds, although for reasons different from those of Justice Marshall. When the *MITE* case reached this Court, MITE's tender offer had been withdrawn. The underlying controversy was over. Nevertheless the State intended to bring an enforcement action, and this, according to the majority, was sufficient to make the case not moot. Justice Rehnquist, disagreeing, reasoned that "threatened, enforcement action hardly justifies the Court's resolution of important constitutional issues in the abstract posture in which they are currently presented." 457 U.S. at 666 (footnote omitted).

This reasoning is fully applicable here. The threat of rescission, when (a) the State's authority to seek rescission is at best highly doubtful and (b) rescission is in fact a practical impossibility, is too meager a basis on which to find a live controversy and on which to proceed to the resolution of important constitutional issues.

This Court's opinion in *Local No. 8-6, Oil, Chemical and Atomic Workers International Union v. Missouri*, 361 U.S. 363 (1960), is also highly instructive. In that case an injunction had been granted against continuation of a labor strike. The strike was later settled, but the Supreme Court of Missouri nonetheless ruled on the constitutionality of the statute upon which the injunction was based. This Court vacated the judgment of the Missouri Supreme Court on grounds of mootness, and stated in language equally applicable here:

> Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall . . . ." *Brownlow v. Schwartz*, 261 U.S. 216, 217-18 [(1923)].

361 U.S. at 371.[20]

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20 This Court has noted probable jurisdiction in *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *prob. juris. noted*, 55 U.S.L.W. 3231 (Oct. 6, 1986), an appeal which does not present the standing and mootness issues that are presented here. Unlike the Ohio Act, the Indiana Statute does not by its terms regulate the right of the acquiring person to purchase shares. It instead purports only to strip the acquiring person of its voting rights absent the requisite shareholder approval. Ind. Code Ann. § 23-1-42-9(a) (Burns Supp. 1986). The Seventh Circuit found this to be a distinction without a difference and concluded that the Statute violates both the Commerce Clause and the Supremacy Clause. *Dynamics Corp.*, 794 F.2d at 261-64. A finding by this Court that the Indiana Control Share Acquisition Statute is unconstitutional will be of significance to the issues raised in this appeal.

For the foregoing reasons the appeal is moot and should be dismissed.

II. THE *MITE* DECISION IS DISPOSITIVE OF THE MERITS OF THE STATE'S APPEAL

The decision of this Court in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), invalidating the Illinois Business Takeover Act (the "Illinois Act"), is dispositive of the merits of the State's appeal and requires that the decision below be summarily affirmed. In *MITE* this Court affirmed the decision of the Court of Appeals for the Seventh Circuit upholding the decision of district court which held the Illinois Act[21] unconstitutional under both the Supremacy Clause and the Commerce Clause. Six Justices issued opinions in *MITE*. All who reached the merits found the statute unconstitutional. As noted above, three Justices dissented on mootness grounds and a fourth, while concurring with the majority, agreed that the case was moot. *Id.* at 655-67.

A majority of the Justices held that the Illinois Act violated the Commerce Clause, because the Act's burden on interstate commerce was excessive in relation to the local interest purportedly served. A plurality of the Justices in *MITE* held the Illinois Act unconstitutional as a direct regulation of interstate commerce, with a sweeping extraterritorial effect. Finally, a plurality of the Justices in *MITE* also agreed that the Illinois Act violated the Supremacy Clause by frustrating the objectives of the Williams Act in a substantial way.

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21 The Illinois Act required that tender offers be registered with the Illinois Secretary of State twenty days before they became effective. Within that time period the Secretary could call a hearing to determine the substantive fairness of the offer. If the Secretary determined that the offer failed to provide adequate disclosure, or was fraudulent or inequitable, he could deny registration and block the offer. Corporations were subject to the Act if Illinois shareholders owned 10% of the stock or where two of the following three conditions were met: (1) the corporation's principal executive office was in Illinois; (2) the corporation was organized under Illinois law; or (3) at least 10% of the corporation's stated capital and paid in surplus was in Illinois. *MITE*, 457 U.S. at 626-27.

Like the Illinois statute, the Ohio Act imposes severe burdens on interstate commerce, which outweigh any putative local benefits, and disturbs the careful balance between offeror and incumbent management and the philosophy of individual shareholder decision-making reflected by the Williams Act. Under *MITE* the Act is unconstitutional.[22]

While the State contends that there has been "extensive" debate since *MITE* concerning the extent to which a state may regulate tender offers for domestic corporations, any debate concerning the validity of statutes such as the Control Share Acquisition Act has been one-sided. There is no split in the circuits concerning the constitutionality of control share acquisition statutes such as Ohio's, which lower courts have consistently held unconstitutional. *See Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250 (7th Cir.), *prob. juris. noted*, 55 U.S.L.W. 3231 (Oct. 6, 1986); *Terry v. Yamashita*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,845 (D. Haw. 1986); *APL Ltd. Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216 (D. Minn.), *vacated per agreement of parties*, Nos. 85-5285, 5286 (8th Cir. Nov. 26, 1985); *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985).[23]

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22 Courts upholding state takeover statutes after *MITE* have done so, consistently with *MITE*, only where the statutes' effect on interstate commerce as well as the conflict with the federal Williams Act have been far less pronounced than is presented here. *See L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 207 (6th Cir. 1985) (the Michigan Take-Over Offers Act violated the Supremacy Clause but did not violate the Commerce Clause where Section 14(d) did not apply to the target company's securities, and where approximately 50% of the shares of the domestic target corporation were held by Michigan residents); *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906 (8th Cir. 1984) (the Minnesota Corporation Take-Overs Act in large part upheld, but unconstitutional insofar as it empowered disclosures not mandated by the Williams Act).

23 The State suggests that this appeal can determine the extent to which a state may regulate tender offers. (State's Brief at 24.) Of course, the more narrow issue that this Court would actually decide is the constitutionality of Ohio's Act. Since *MITE*, states have adopted various approaches in attempting to regulate tender offers for domestic corporations. *See e.g.*, Md. Corps. & Assn's Code Ann. §§ 3-601 *et seq.* (1985); Minn.

A. The Act Violates The Commerce Clause

1. The Act Is Unconstitutional As a Direct Regulation of Interstate Commerce

This Court consistently has held that "a state statute which . . . directly interferes with or burdens [interstate] commerce is a prohibited regulation and invalid, regardless of the purpose with which it was enacted." *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) (footnote omitted). *Accord, Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. 2080, 2084 (1986) (in invalidating a state statute as an unconstitutional direct burden on interstate commerce, the Court stated, "[w]hen a state statute directly regulates or discriminates against interstate commerce . . . we have generally struck down the statute without further inquiry"); *MITE*, 457 U.S. at 642-44; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976).

A plurality of the Justices in *MITE* held the Illinois Act unconstitutional because, far from being directed at in-state transactions and only incidentally affecting interstate commerce (as with blue sky laws generally), it was a direct regulation of interstate commerce with a sweeping nationwide effect. *MITE*, 457 U.S. at 643.[24]

Footnote 22 continued:

Stat. Ann. §§ 80B.01 *et seq.* (West 1986); N.Y. Bus. Corp. Law § 912 (McKinney 1986); 15 Pa. Cons. Stat. Ann. §§ 1408, 1409.1 (Purdon Supp. 1986).

24 In the Illinois Act under review in *MITE*, the Secretary of State had the ability to block the tender offer. In the Act, that power has been passed on to incumbent management and a group vote by the shareholders of the corporation. In both cases, the state statutes restrict the ability of a tender offeror to buy shares pursuant to a nationwide interstate tender offer.

The Act confers on the State no enforcement authority, apparently to avoid the infirmities of *MITE*. Yet in pursuing this appeal and claiming a right to enforce the Act and to seek rescission of purchases made in violation of the Act, the State in essence invites this Court to find that the Act has the same infirmities as the Illinois statute struck down in *MITE*.

It is beyond dispute that the Ohio Control Share Acquisition Act has a substantial and direct impact on interstate commerce. The Act purports to regulate transactions in securities between willing buyers and willing sellers throughout the United States, including transactions taking place exclusively outside of Ohio. As the District Court found:

> The [Act] directly regulates, and prevents if its terms are not satisfied, interstate tender offers for shares of stock of Ohio corporations and the interstate transactions associated with such tender offers.

(State's App. at A-33.)

This same conclusion has been reached by a number of other courts, which also have invalidated control share acquisition statutes, finding that they directly regulate interstate commerce in violation of the Commerce Clause. *Terry v. Yamashita*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,845, at 94,114-15 (D. Haw. 1986) (holding unconstitutional and enjoining enforcement of the Hawaii Control Share Acquisition Statute); *Icahn v. Blunt*, 612 F. Supp. at 1414-15 (holding unconstitutional the Missouri Control Share Acquisition Act, a statute substantially similar to the Act).

The Ohio Control Share Acquisition Act imposes a direct and substantial burden on interstate commerce by regulating interstate tender offers and transactions in securities taking place wholly outside of the state of Ohio. Thus, it is an unconstitutional restraint on interstate commerce and violates the Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 106 S. Ct. at 2084; *MITE*, 457 U.S. at 641-43.

2. The Act Imposes an Unconstitutional Indirect Burden on Interstate Commerce

In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court set forth the following test for analyzing statutes which indirectly burden interstate commerce:

> Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 [(1960)]. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142. *Accord, Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Under this standard, the Act is unconstitutional.

In contrast to the severe burdens on interstate commerce imposed by the Act, any benefits created by the Act are negligible, if they exist at all. According to the Ohio legislature, the principal local interest that the Act purportedly advances is as follows: since tender offers can lead to later changes in basic corporate structure similar to those that occur when a merger or consolidation is accomplished, the Act provides a mechanism whereby shareholders in an Ohio corporation can express their views as a group by voting on a tender offer, just as they would on a merger or consolidation. *See* O.R.C. § 1701.832.

This rationale cannot withstand analysis. First, to the extent the Act regulates out-of-state residents, it fails automatically. In *MITE* this Court noted that, although protecting local investors was a legitimate local interest, the Illinois Act regulated transactions between nonresident shareholders and tender offerors having no connection with the state. To the extent the Illinois Act burdened out-of-state transactions, the Court held that "there is nothing to be weighed in the balance to sustain the law." 457 U.S. at 644.

Second, although the State attempts to extend the internal affairs doctrine to apply to the Act, that doctrine cannot justify regulation of nationwide interstate tender offers. This Court expressly rejected the internal affairs rationale in *MITE*. 457 U.S. at 645.

Ohio's attempt to analogize the Act to its regulation of mergers and consolidations (O.R.C. § 1701.832; State's Brief at 15-16) fails.[25] In a merger or consolidation, the corporation is a party to the transaction in question and will either cease to exist or be substantially altered as a result of the transaction — it is a transaction between a third party and *the corporation itself*. In sharp contrast, a tender offer is a transaction between a third party (the tender offeror) and individual shareholders, to which the corporation is not a party and in which it has no role. Thus, a tender offer does not implicate the internal affairs of the corporation.[26]

In sum, there is simply no substantial benefit to resident investors to weigh against the Act's excessive burden on interstate commerce. To the extent the protections afforded by the Act essentially parallel those provided by the Williams Act, the interests of Ohio citizens are not substantially advanced. *MITE*, 457 U.S. at 644-45.

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25 Ohio has also attempted to legitimize the Act's burden on interstate commerce by pointing to Delaware Supreme Court approval of the defensive tactics taken by incumbent management to thwart unsolicited takeover attempts. (State's Brief at 17.) As the Delaware Supreme Court noted "the analysis in *Edgar* [is not] applicable to the actions of private parties." *Moran v. Household Int'l Inc.*, 500 A.2d 1346, 1353 (Del. 1985).

26 The other domestic corporate regulations which Ohio cites are equally unavailing (State's Brief at 16); they are merely general regulations of corporate governance with only an incidental effect on interstate commerce. The Act, on the other hand, is an explicit regulation of tender offers with an effect on interstate commerce that is direct and substantial. *See Dynamics Corp. of Am.*, 794 F.2d at 264; *APL Ltd. Partnership v. Van Dusen Air, Inc.*, 622 F. Supp. 1216, 1223-24 (D. Minn.), *vacated per agreement of parties*, Nos. 85-5285, 5286 (8th Cir. Nov. 26, 1985).

To the extent the protection afforded by the Act goes beyond the Williams Act, any such added "protections" are "of dubious value." *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425, 1430 (10th Cir. 1983). Moreover, the cost of such increased "protections" is prohibitive, since the delays and burdens inherent in the Act make the consummation of tender offers more difficult and unlikely, thereby actually harming the very shareholders the Act purports to protect. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d at 565-66.

B. The Act Violates The Supremacy Clause

Federal law preempts a state statute where (i) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or (ii) "the purpose of the federal statute would to some extent be frustrated by the state statute," *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963).

1. The Williams Act Requires Evenhanded Neutrality

The 1968 Williams Act amendments to Sections 13 and 14 of the Exchange Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)(1981),and the SEC's accompanying rules, establish a comprehensive uniform national system for the regulation of all aspects of tender offers. In adopting the Williams Act, Congress did not seek to prohibit or unduly hinder tender offers — indeed, it expressly recognized that they serve an important function by holding target company management accountable for their stewardship of the corporate enterprise while at the same time providing stockholders with an opportunity to receive a premium for their shares. H.R. Rep. No. 1711, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2811, 2813; 113 Cong. Rec. 24662, 24664

(1967). Rather, Congress determined that the success or failure of a tender offer should be left solely to the informed investment decisions of the individual stockholders of the target company, who should be free to sell or retain their stock in response to their own view of the economic merit of the offer. *MITE*, 457 U.S. at 633-34.

Congress determined that once the required Williams Act disclosures had been made, shareholders should be free to decide *for themselves* whether or not to accept such offers. *Id.* at 634.

In enacting the disclosure requirements of the Williams Act, Congress expressly disclaimed any intention to provide management with a weapon to discourage takeover bids. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975). The courts have repeatedly recognized this Congressional policy of protecting shareholders while maintaining a posture of even-handed neutrality as between acquiror and target management. *See, e.g., Schreiber v. Burlington N. Inc.*, 105 S. Ct. 2458, 2463, 2465 (1985) ("The expressed legislative intent [of the Williams Act] was to preserve a neutral setting in which contenders could fully present their arguments. . . . Congress' consistent emphasis on disclosure persuades us that it intended takeover contests to be addressed to shareholders."); *MITE*, 457 U.S. at 633.

In particular, Congress recognized that delay can "tip the scales" sharply in favor of management and can be fatal to a tender offer by affording target company management, or third parties, an opportunity to interfere with and defeat the offer. *See* S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967). As this Court took care to point out in *MITE*, Congress recognized that delay is a potent weapon favoring management in a takeover fight, and thus provided for relatively short time periods between the commencement of a tender offer and its consummation. 457 U.S. at 638-39.

Federal law permits tender offers to proceed in accordance with certain carefully drawn regulations respecting the timing

of the commencement of tender offers, the period of time that a tender offer must remain open, and the period of time in which shareholders must be permitted to withdraw tendered shares. No power was granted to state regulatory bodies or target companies to expand or interfere with these time periods.[27]

2. The Act Directly Conflicts With The Purposes and Objectives of The Williams Act

The Act promotes a blatant pro-management bias and therefore frustrates the objectives of the Williams Act. The Act radically upsets the balance Congress sought to maintain between the offeror and target management by undercutting the time periods delineated by Congress, and by creating delay.

Under the Williams Act an offeror such as Fleet is permitted to complete its tender offer in twenty business days. The Act renders this impossible. Under the Act, target management can delay holding the required shareholders meeting — and prevent the purchase of shares — for up to fifty days after the commencement of the tender offer. O.R.C. § 1701.831(C). Even then, by the time the shareholder votes are counted and

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27 Under the Williams Act and the SEC's regulations promulgated thereunder, upon the commencement of any tender offer for five percent or more of the equity securities of a public company (or "issuer"), the offeror must file with the SEC and deliver to the issuer and any exchange on which the issuer's securities are traded a statement on Schedule 14D-1 providing detailed information about the terms of the offer, the offeror, the offeror's plans, the source of funds for the offer and the target company. 15 U.S.C. § 78n(d)(1), 17 C.F.R. § 240.14d-3 (1986). Within ten business days from the date the tender offer is first published or sent or given, the subject company must publish, send or give to shareholders a statement disclosing its recommendation with respect to the tender offer. § 240.14e-2(a).

The tender offer must remain open for not less than twenty business days. § 240.14e-1(a). Shareholders who tender their shares must be permitted to withdraw them during the period that the offer remains open. § 240.14d-7. Where the offer is for less than all of the outstanding shares of the target company, the offeror must purchase tendered shares on a pro-rata basis. § 240.14d-8.

any attendant legal challenges to the vote or the holding of the meeting are resolved, the delay will likely be far longer.[28]

Thus, without question, the Act advantages target company management by mandating delay that is inconsistent with the scheme of the Williams Act. Such delay provides incumbent management with time to implement alternative schemes to avoid the takeover, such as self tender offers, dividend increases, defensive mergers and restrictive loan agreements, to name but a few. *See MITE*, 457 U.S. at 638 & n.13; *Dynamics Corp. of Am.*, 794 F.2d at 262-63.

The Act is wholly inconsistent with the purpose and policy of the Williams Act, and frustrates the clear Congressional intent of that legislation with respect to nationwide interstate tender offers such as Fleet's. The court below thus correctly held that the Act violates the Supremacy Clause.

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28 *See, e.g., Wick v. Youngstown Sheet & Tube Co.*, 46 Ohio App. 253, 188 N.E. 514 (1932) (sale of assets approved by two thirds of the shareholders, but minority succeeded in obtaining injunction prohibiting sale; appellate court held over two years later that injunction should not have issued).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal docketed by the State. In the alternative, if the appeal is not dismissed, this Court should summarily affirm the unanimous decision of the Sixth Circuit.

Respectfully submitted,

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